No. 3959

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN COMMERCIAL COMPANY OF ALASKA (a corporation),
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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Statement of the Case.

This case is before this court upon writ of error to the United States District Court of the Territory of Alaska. Action was instituted by the Territory of Alaska in the United States District Court for the Territory of Alaska, Fourth Division, against the plaintiff in error, Northern Commercial Company of Alaska, upon a complaint containing two causes of action. The first cause of action alleges that the defendant was engaged in dealing in furs in the Territory of Alaska and held stationary fur-buyer's license pursuant to the provisions of Chapter 42 of the laws of Alaska for the year 1921; that

while the defendant held such license, defendant purchased, or otherwise acquired, between January 13 and July 27, 1922, certain pelts, enumerating them, and that by reason thereof there became due to the Territory of Alaska under the law aforesaid, license taxes on each pelt in a certain sum, the aggregate tax thus becoming due being the sum of $59.35, and claiming on behalf of the Territory a paramount lien upon the pelts enumerated and upon all of the property of the defendant.

The second cause of action is in the same form, differing only in the substance of the allegations, this count having reference to the business done by the defendant as a stationary fur-buyer at Tanana in Fort Gibbon precinct, Alaska, and the tax claimed aggregating the sum of $1531.80, plaintiff praying for judgment in the sum of $1591.15.

Defendant and plaintiff in error interposed a demurrer to each count of the aforesaid complaint, alleging that no cause of action was stated and that Chapter 42 of the Session Laws of the Territory of Alaska for the year 1921 is void for certain reasons, among others, that the legislature of the Territory of Alaska was without power or jurisdiction to enact said law; that said act is in violation of the provisions of the organic act under which said legislature was created; that the subject matter of said act was not set forth in the title and that the portion of the law which attempts to levy a tax upon furs is void.

The demurrer was overruled, and upon the defendant having declined to amend, the court ordered judgment on the pleadings, and thereupon judgment was entered against the defendant in the sum prayed for in the complaint and providing for a first and paramount lien upon the said taxed property and all of the property of defendant. Thereupon, the defendant petitioned for a writ of error, which petition was allowed.

I.

CHAPTER 42 OF THE SESSION LAWS FOR THE TERRITORY OF ALASKA FOR THE YEAR 1921, THE VALIDITY OF WHICH IS IN ISSUE ON THIS APPEAL.

"Chapter 42. An act to impose a license tax on the business of fur-farming, trapping and trading in pelts and skins of fur-bearing animals, and declaring an emergency.

Be it enacted by the legislature of the Territory of Alaska:

Section 1. No person shall engage in the business of fur-farming or of buying or dealing in furs without first securing from the Commissioner and Ex-officio Recorder a license so to do. The license fee for each license shall be ten dollars ($10) for the business of fur-farming, twenty-five dollars ($25) for stationary fur-buyers, and one hundred and fifty dollars ($150) for itinerant fur-buyers, which fee shall be paid to the Commissioner before the license is issued.

Section 2. The license shall be issued for not more than one year and shall expire on the first day of August next after its issue. The application for the license shall be filed with the Commissioner and shall be accompanied by license fee. It shall give the name of the applicant and the business to be engaged in, the place where applicant wishes to conduct a business under the license, unless he be an itinerant, in which event that fact must be stated, and shall contain an agreement that the applicant as licensee will abide by and faithfully carry out the provisions of this act and before the end of the license year remit to the Commissioner the tax due upon the pelts handled, as herein provided. When such application is received by the said Commissioner, the latter shall issue the license, which shall state the name of the licensee, his place of business and the time when the license expires.

Section 3. In addition to the license fee above provided for the licensee shall pay to the Commissioner who issued the license the following license fees on each pelt taken by a fur-farmer or purchased or otherwise acquired by a fur-buyer, or taken by a trapper and not sold to a licensed fur-buyer, to-wit:

On each	polar bear	.....	$ 2.50
" "	brown bear	.....	1.00
" "	grizzly bear	.....	1.00
" "	black bear	.....	.50
" "	beaver	.....	.50
" "	fisher	.....	2.00
" "	fox, silver	.....	3.50
" "	" black	.....	3.50
" "	" cross	.....	1.00
" "	" blue	.....	1.50
" "	" red	.....	.50
" "	" white	.....	1.00
" "	lynx	.....	.50
" "	marten	.....	.50

On each		mink	$ .25
"	"	muskrat	.05
"	"	otter, land	.50
"	"	otter, sea	100.00
"	"	weasel	.05
"	"	wildcat	.25
"	"	moose trophy	10.00
"	"	caribou trophy	5.00
"	"	deer trophy	2.50
"	"	sheep trophy	5.00
"	"	goat trophy	5.00
"	"	pelt not specifically mentioned in the above schedule	.10"

Other provisions of the act relating to the determination of the amount of tax, collection and enforcement will be set out hereinafter as occasion arises to deal with them.

II.

PROVISIONS OF THE ORGANIC LAW OF THE TERRITORY OF ALASKA TO WHICH REFERENCE WILL HEREINAFTER BE MADE.

An act to create a legislative assembly in the Territory of Alaska to confer legislative power thereon and for other purposes.

Act of August 24, 1912, Ch. 387, 37 Stat. L. 512.

"Sec. 3. CONSTITUTION AND LAWS OF UNITED STATES EXTENDED. That the constitution of the United States, and all the laws thereof which are not locally inapplicable shall have the same force and effect within the said territory as elsewhere in the United States; that all the laws of the United States heretofore passed establish-

ing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature; *Provided,* That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes,' approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof; *Provided further,* That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. And the legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of the district courts of the United States."

"Sec. 9. LEGISLATIVE POWER. The legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States * * * provided all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof. No tax shall be levied for territorial purposes in excess of one per centum

upon the assessed valuation of the property therein in any one year."

III.

ASSIGNMENT OF ERRORS RELIED UPON.

I. That the United States District Court for the Fourth Division of the Territory of Alaska erred in overruling the demurrer interposed by the defendant and plaintiff in error to the original complaint filed in the cause.

II. That said court erred in upholding Chapter 42 of the Session Laws of the Territory of Alaska for the year 1921, and in refusing to declare Section 3 of said act unconstitutional and void.

III. That said court erred in assuming jurisdiction of said cause, and in refusing to dismiss said cause for lack of jurisdiction or authority to hear and determine same.

IV. That said court erred in giving, making, and entering judgment in favor of plaintiff and against defendant upon plaintiff's complaint on file in said cause, which said judgment was given, made and entered on the 24th day of November, 1922, and was for the sum of $1591.15, together with costs in the sum of $14.60.

V. That said court erred in failing to dismiss plaintiff's action.

VI. That said court erred in failing and refusing to enter judgment in favor of defendant.

IV.

STATEMENT OF THE POSITION OF PLAINTIFF IN ERROR UPON THIS APPEAL.

It is conceded that the territorial legislature has the power to levy occupational or privilege taxes. It must likewise be conceded by our adversaries that no property tax can be levied without regard to the value of the property taxed. It is the contention of plaintiff in error that the territorial legislature has undertaken to do by indirection what cannot be directly done, that is, to levy under the guise or form of a license tax, a tax upon the property used in the business of fur-farming, trapping and trading in pelts and skins of fur-bearing animals. If force and effect is to be given to the provisions of the organic law prohibiting property taxes except after an assessment of the value of all the property in the territory and under a general law applicable to all the taxable property in the territory, then the legislature must not be permitted to levy a property tax simply by calling it a license tax and including it in the terms of a bill which is entitled "An act to impose a license tax". To hold otherwise, would, in effect, nullify the provisions of the organic act. We contend, therefore, that if it be shown that the tax imposed by Section 3 of the act in question is in

reality a property tax it must be adjudged void, despite the fact that it is included in an act imposing a license tax, and that the defendant in error cannot justify such tax upon the ground that it is simply a measurement of the amount of license tax to be paid by persons engaged in the business of fur-farming, trapping and trading in pelts and skins.

V.

PRELIMINARY DISCUSSION.

Section 1 of the act in question prohibits the pursuit of the business of fur-farming or of buying or dealing in furs without first securing a license so to do. The license fee is fixed at $10.00 for the business of fur-farming, $25.00 for stationary fur-buyers and $150.00 for itinerant fur-buyers, which fee shall be paid to the Commissioner before the license is issued. The legislature of Alaska, we agree, has a right to levy such a license fee or excise tax. Under the terms of Section 3, however, of the act in question, the legislature requires the holder of the license authorized to be issued under the terms of Section 1 to pay an additional tax upon each pelt purchased or otherwise acquired by a fur-buyer. This exaction is, we contend, a tax upon property, arbitrarily assessed, without regard to the value of the property taxed, and therefore void under the provisions of Section 9 of the organic act above quoted providing that

> "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessment shall be according to the actual value thereof. No tax shall be levied for territorial purposes in excess of one per centum upon the assessed valuation of the property therein in any one year."

It is conceded that the legislature may lawfully, under the guise of an excise tax, tax the profits made by fur dealers or tax the appliances used by fur dealers in conducting their business. The legislature, however, cannot, by giving this tax the name of license tax, change its character as a property tax.

VI.

DISTINCTION BETWEEN A LICENSE TAX AND A PROPERTY TAX.

In entering upon a discussion of the law of this case, we must, of course, be mindful of the broad rules of construction by which the courts are guided in ascertaining the legislative intent. We must also recognize that this court has heretofore in other cases considered the right of the legislature of the Territory of Alaska to levy occupational or business taxes for the purpose of raising revenue, and has upheld such right. We must concede that if by a reasonable construction the tax here in question is in reality a tax on the business of fur-farming, trapping and trading in pelts and skins and is not a tax on property, it must be upheld. In approaching

the consideration as to what may be the proper construction of the act in question, it is important to point out the distinction between a license or occupation tax and a property tax.

An occupation or license tax is an exaction levied on the privilege of carrying on a business or performing some act which without the payment of the exaction would be prohibited. It is comprehended within the larger term of "excise taxes."

> "Excises, in their original sense, were something cut off from the price paid on a sale of goods, as a contribution to the support of government. The word has, however, come to have a broader meaning and includes every form of taxation which is not a burden laid directly upon persons or property; in other words, excise includes every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation."
> 26 R. C. L. 34.

Broadly, excises and property taxes are distinguished as follows:

> "If a tax is imposed directly by the legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer irrespective of the nature or value of the taxpayer's assets, it is regarded as an excise; but if the tax is computed upon a valuation of property, and assessed by assessors either where it is situated or at the owner's domicile, although privileges

> may be included in the valuation, it is considered a property tax."
>
> 26 R. C. L. 35.

More particularly it is said:

> "It is sometimes difficult to determine from the wording of a statute or ordinance whether the tax imposed thereby is *upon property or upon business;* but where it is clearly a property tax, it will be so regarded, even though called a business tax, and, on the other hand, a tax which is levied upon persons on account of their business will be construed as a business tax, even though it is graduated according to the property used in such business." (Italics ours.)
>
> 21 *Amer. & Eng. Ency. Law,* 775.

> "A license tax is not a property tax. The burden is not laid upon the rem. The license is exacted for the privilege of using the vehicle upon the public highways, * * *."
>
> *Windham v. State,* 77 So. (Ala.) 963, 964.

In *Thompson v. McLeod,* 73 So. (Miss.) 193, where a so-called privilege or occupation tax was held in fact to be one on property, the court said:

> "The imposition of such a tax is not on a business, but on the property involved."

From the foregoing authorities it is apparent that the two classes of taxes must be distinguished by determining from all the evidence whether it is the rem—the property—or the privilege of doing business that is the subject of the taxation.

VII.

THE ACTUAL EFFECT OF THE TAX, AND NOT THE NAME GIVEN IT IS DETERMINATIVE OF ITS CHARACTER.

In its title, Chapter 42 of the law of 1921, purports to levy a license tax on the business of fur trading. The name thus given, however, is not controlling. The courts have repeatedly held that in these matters of taxation, they will look through form to substance, and will prevent that from being done by indirection which could not be accomplished directly.

Wheeler v. Weightman, 149 Pac. (Kan.) 977;
Choctaw O. & C. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234;
Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037;
21 *Amer. & Eng. Encyc. Law,* 775, supra.

In determining, therefore, whether the tax is in fact upon the property or on the business, its provisions and their actual effect must be controlling.

VIII.

SECTION 3 OF THE ACT LEVIES A PROPERTY TAX ON FUR PELTS, BECAUSE THE ACT ITSELF SHOWS THAT THE TAX IS IMPOSED ON THE PELTS AND NOT ON THE BUSINESS.

Necessarily, the language of the statute should first be considered in determining its construction, and the act in question when so considered shows unequivocally that the legislature in Section 3 levied a tax on property itself.

Section 1 of the act, no doubt, levies an occupation tax on the business of fur-trading. It provides:

> "The license fee for each license shall be ten dollars ($10) for the business of fur-farming twenty-five dollars ($25) for stationary fur-buyers, and one hundred and fifty dollars ($150) for itinerant fur-buyers, * * * "

Section 2 providing for the character of the license, requires that it must contain an agreement that the licensee will, at the end of the license year, remit to the Commissioner "the tax due upon *the pelts handled* as herein provided." (Italics ours.)

Section 3 then provides:

> "In addition to the license fee above provided for the licensee shall pay to the Commissioner who issued the license the following license fees *on each pelt taken* by a fur-farmer or purchased or otherwise acquired by a fur buyer or taken by a trapper and not sold to a licensed fur buyer * * * " (Italics ours.)

This section contains the only language in the act characterizing the tax as a license. Section 2 refers to the payment of *"the tax due on the pelts"*. Section 4 speaks of the *"remittance of the tax upon the pelts handled"*. All the other provisions of the act show it to be levied on the property and not on the privilege of carrying on the business of fur trading. Section 5 requires the Commissioner to issue receipts for "all licenses *and* taxes collected," and also uses the phrase *"license tax on pelts"* and again speaks of "receipts in duplicate for all licenses *and*

taxes collected." Section 9 requiring the licensees to keep records of furs taken, says, "Such records shall show the species of each pelt with sufficient distinctness to determine the *tax payable thereon.*" Section 11 provides for a lien upon the *"pelts on which the tax accrues."* Section 15 refers to *"any pelt on which the tax has not been paid."*

The foregoing references should be sufficient in themselves to show that the impositions in Section 3 are not placed on the business of fur-trading, but on the furs—the property. In six different places in the act they are characterized as taxes due on the *pelts*—not on the business or the privilege of doing business. Nowhere in the act are they characterized as taxes on the privilege or doing business as a fur-trader. They are uniformly referred to as taxes "on the pelts". Section 1 and Section 2 cover the payment for and issue of the license to fur traders. Section 3 places a tax on pelts. And twice in Section 5 this construction is borne out by the use of the phrase *"licenses and taxes collected."* (Cf. the language in *State v. Bengsch,* ante.)

It is significant, too, that Section 11 makes the tax a lien on the pelts on which the tax accrues, an universal characteristic of a property tax. *Thompson v. McLeod,* 73 So. (Miss.) 193, 194.

It has been suggested that the sums imposed in Section 3 merely measure the quantum of the tax that is to be paid for the privilege of doing business. But such is not the language of the act. The ref-

erences just made to the recitals in the act clearly indicate this. Section 2 provides for the actual issuance of the license upon the agreement of the licensee to pay the *"tax due on the pelts handled"* not on the privilege or license. In the second place the arbitrary amounts assessed on each variety of pelt taken, irrespective of its actual value or the use to which it subsequently is put, palpably are not intended to measure the quantum. It is true it varies with the number of furs purchased, but there the relation ends. It has no connection with the actual value paid; it is assessed irrespective of whether the furs are sold or are used for other purposes; it has no regard to the sale price which the pelts bring when sold, and hence only in the most remote way indicates the actual volume and value of business transacted.

> "Taxes upon the aggregate purchases of a merchant, the gross receipts of a business, or the premiums received by an insurance company are business taxes; but bonuses given for corporate franchises or taxes upon the capital stock of corporations are not." 21 Amer. & Eng. Encyc. Law 775.

A tax on aggregate purchases is a tax on the amount actually paid out for their purchase, a factor that has some direct relation to the business as conducted. The same is true of gross receipts. On the other hand, a fixed amount exacted for every article bought by the licensee without any relation to the value of the article to the business, is essen-

tially arbitrary and is itself evidence of an intention to tax the article and not the business.

Finally it is to be noted that no license is required of trappers in Section 1, but in Section 3 it is provided that they must pay a tax on such pelts as have been acquired but have not been sold to a licensed fur buyer. What clearer demonstration of this tax as a property tax could be made? The act purports to levy a license tax on the business of trapping, yet in Section 3, the trapper avoids the tax if he has transferred the pelts to a licensed fur buyer. Thus it is plainly seen that the intent of the legislature was to levy a tax on the pelts, whosoever may own them, and not on the business of trapping.

Throughout the entire act the pelt itself is looked to as the subject of and the security for the tax no matter in whose hands it may be. Section 3 of the act clearly shows that the legislature has levied a tax on property and the authorities support this conclusion.

The following statement in *Ruling Case Law* aptly fits the case under consideration:

> "A tax on the ownership of property, whatever it may be called, is a property tax. A tax on a thing is a tax on all of its essential attributes, and a tax on an essential attribute of a thing is a tax on a thing itself; so that a tax on a thing owned is necessarily a tax on the right of ownership thereof, and a tax on the ownership of a thing is necessarily a tax on the thing itself. No definition of property can be framed

> which does not include the right of ownership, consequently, no tax can be imposed upon the right of ownership which is not also a tax on property. It follows that a tax on the attributes of ownership, or on the right to make the only use of property for which it is of any value, is a tax on the property itself. Thus a tax on the sale of an article imported only for sale, is a tax on the article itself. It is for this reason that it is held that a tax upon the income of real or personal property is in effect a tax upon the property itself, although a tax on the gross receipts, or on the income from a business, trade, profession, or employment, is an excise tax." 26 R. C. L. 36.

The principles just set forth are applied in the following authorities:

> "A tax on a merchant's, manufacturer's or miner's gross sales is not the same thing as one on his stock treated as property."
>
> *Choctaw O. & G. R. Co. v. Harrison,* 235 U. S. 292; 59 L. Ed. 234, 238.

Livingston v. Albany, 41 Ga. 22. A tax of one dollar was imposed on each and every horse or mule offered and sold within the City of Albany by or belonging to horse or mule drovers. The court said, in holding that the law violated the uniformity provision of the constitution, similar to Section 9 of the Alaskan organic law:

> "A tax upon the sale of horses or mules, or upon horses or mules sold, is a tax on property * * *. A tax of a certain sum on each horse or mule sold, is not an ad valoren tax as one of these animals may be worth $100 or another

$500." (Followed in *Kenny v. Harwell,* 42 Ga. 416.)

City of Brookfield v. Tooey, 141 Mo. 619, 43 S. W. 387. The city levied a license tax on merchants for the right to do business of 1% of the value of merchandise on hand or to be kept on hand for the year, to be paid annually. The ordinance also required the issuance of a license at a cost of fifty cents. Holding that the tax was on property, the court said:

> "After a careful investigation of the questions mooted and most ably discussed by counsel, it seems palpable that this is a 'property tax' pure and simple. It is an obvious misnomer to call it a 'tax upon occupation.' While cities of the third class may exact a license tax upon occupations or callings, the tax thus enacted must be upon the privilege itself, and not a plain ad valorem tax upon property as this ordinance levies." (Followed in *State v. Stephens,* 48 S. W. (Mo.) 929, 935.)

The language of the Tooey case was most forcefully emphasized in *State v. Bengsch,* 70 S. W. (Mo.) 710, 721, which involved a tax of an arbitrary amount on certain measures of intoxicating liquors sold. In his specially concurring opinion, Valiant J. said, referring to the Tooey case:

> "That was not a liquor traffic license, and therefore all that is said in that case may not be applicable here; but it is to this extent applicable, viz: The court is not bound by mere form of expression used in the act, if the purpose is otherwise manifest,—is not bound to ad-

> judge it to be a license tax merely because it is so named, if, on the whole act it clearly appears to be a property tax, which, in my judgment, this is."

The same justice further said in reference to the particular act under discussion:

> "It is argued that the imposition of a high license tax is in itself a form of police regulation. That is so when it is imposed on the privilege to do business, but, when the law prescribes conditions as prerequisite to the right to do the business, then, when those conditions have all been satisfied, the property employed in the business is subject to taxation only as required in Article 10 of the constitution."

Smith v. Court of County Commissioners, 23 So. (Ala.) 141. A tax of one dollar was levied on each vehicle as a prerequisite to the right to use the roads. The court held:

> "It is plainly and unequivocally a tax on property and the sum of the tax laid upon all vehicles in a given class is the same without regard to the value of the vehicle."

See also *Sims v. Jackson,* 22 La. Ann. 440.

Pittsburgh, C. & St. L. Ry. Co. v. State, 30 N. E. (Ohio), 435 involved a "fee" of one dollar per mile levied on railroad tracks.

> "The statute calls it a fee, but its nature is not affected by the name that may be assigned to it. It is an exaction levied upon railroad tracks, and railroad tracks are property. It does not differ in principle from a fixed sum levied upon all the farmers of the state for each

> acre of land of which they may be seized, or each head of horses or other live stock that they may own. In both instances the tax is levied upon property, but it is neither levied 'according to its true value in money' nor uniformly upon all property, both of which are constitutional requirements."

Thompson v. McLeod, 73 So. (Miss.) 193, is of particular interest, since its facts are substantially the same as in the instant case.

> "The act under review does not levy a privilege tax on the right or privilege of selling resin or the gum of the tree as originally extracted and commonly known as 'crude'; but the privilege, if any, which is taxed, is the privilege or right of the owner or lessee of pine trees to 'extract turpentine from standing trees.' Section 1 of the act makes no effort to conceal the subject matter of the tax. It expressly declares that it is 'levied on the gross annual cutting or extraction,' and the tax levied is 'one fourth of one cent each year for each cup or box.' It is true the act in other language refers to it as a business—'a business of extracting turpentine from standing trees.' The imposition of such a tax is not on a business, but on the property involved. Here we have a citizen of our state who owns and operates his own turpentine distilleries, who owns the pine trees which produce the resin, the crude product without which his distilleries cannot be operated, and although he pays ad valorem taxes upon his land and standing trees at their true value, and although he pays a privilege tax for the right to manufacture spirits of turpentine from the annual product of the trees, he is now called upon to pay an additional tax of one fourth of one cent on each box cut or chopped on the trees, and it requires no refinement to observe at once that

this is an additional burden or taxation operating, not indirectly, but directly upon complainant's property."

The tax on furs here involved is the same as the tax on each mule or horse sold in the Livingston case, supra; the same as the tax on the stock of the merchant in the Tooey case, supra; the same as the tax on the liquor sold in the Bengsch case; the same as the tax on vehicles in the Smith case; the same as the tax on railroad track in the Pittsburgh case; the same as the tax on the cups in *Thompson v. McLeod*—all were taxes on the property and not on the privilege of conducting the business.

VIII.

PRIOR DECISIONS INVOLVING ALASKAN LICENSE TAXES.

This honorable court has on previous occasions had to deal with license taxes imposed by the Territorial Legislature. The most important of these are:

Alaska Pacific Fisheries v. Alaska, 236 Fed. 52;

Hoonah Packing Co. v. Alaska, 236 Fed. 61;

Alaska Salmon Co. v. Alaska, 236 Fed. 62;

Alaska Mexican Gold Mining Co. v. Alaska, 236 Fed. 64;

Alaska Pacific Fisheries v. Alaska, 236 Fed. 70.

The taxes involved in all of these cases were held valid notwithstanding Section 9 of the organic act. An examination of them, however, will show that all of the impositions were considered true business taxes, levied on the privilege of doing business and not on the property of the licensee. None were comparable in character or effect with that imposed in Section 3 of the act here considered.

Alaska Pacific Fisheries v. Territory of Alaska, 236 Fed. 52.

This is the case upon which defendant in error chiefly relies. The plaintiff in error in that case was sued by the territory for moneys alleged to be due for prosecuting the business of fishing with fish traps in the waters of Alaska. The act in question imposed a license tax for respective lines of business, among others, "Fish traps: Fixed or floating, one hundred dollars per annum. So called dummy traps included." The principal point in the case was whether or not the territory had power to impose a license tax for revenue. The court held that the territory had such power. It was also contended by plaintiff in error that the legislature did not have reference to the business of fishing with fish traps, because dummy traps were included, and since dummy traps cannot be used in fishing, it was urged that the legislature intended to place a specific property tax on fish traps regardless of whether they were used in catching fish or not. The court held that the inclusion of dummy traps in the

business of fishing with fish traps showed no intent to tax fish traps as property inasmuch as dummy traps may be said to be incidental to the business of fishing with fish traps. The court conceded that if the true construction of the act was that it imposed a tax upon the property used in the business of fishing it would be void. It was held in that case that carrying on the line of business of fish traps in Alaska is understood to be fishing with fish traps, hence the act showed no intent to tax fish traps as property rather than to tax the business of fishing with fish traps.

In the instant case we have shown that in Section 3 of the act under consideration no legislative intent is manifested to tax the business of fur farming, trapping and trading in pelts, since trappers who have sold their pelts to a licensed fur buyer need not pay the tax. If the tax were on the business of trapping the fact that the trapper had sold his pelts would not relieve him from the burden of paying the tax. The legislature doubtless intended that pelts which had been sold to a licensed fur buyer would be taxed to the latter, and not wishing to tax the same property twice, relieved the trapper of paying the tax on the pelts so sold, thus confirming the hypothesis of an intent to tax the property itself. We therefore distinguish the instant case from the Alaska Pacific Fisheries case upon the ground that in the former case a clear legislative intent to tax the property, i. e., the pelts, appears whereas in the

latter case the intent to tax the business of fishing with fish traps was manifested.

The Hoonah case, supra, was decided on the authority of the Pacific Fisheries case just discussed without opinion.

The Alaska Salmon Co. case involved a tax imposed by the territorial legislature measured by the output of the canneries which in effect duplicated a similar Congressional tax but which the court held was none the less valid. No contention was made that what purported to be a license tax was in fact a property tax. It must be noted, too, that this was an output tax, which is entirely different from the tax here in question. Furthermore, the act imposing the tax recited that the licensees should "pay for said license for the respective lines of business and trades, as follows, etc." specifically making it a license tax and not terming it a tax on the goods.

The second Alaska Pacific Fisheries case decided that there was civil liability for the tax, that the act was definite enough to be enforced, and that it could be enforced although the same subject was covered by a Congressional enactment.

The Gold Mining Co. case involved a license tax measured by a per centage of gross receipts, a standard that has been universally approved and which is strikingly different from that imposed in Section 3 of the act of 1921.

The only other case that merits consideration in this connection is that of *Alaska Fish Salting & By-*

Products Co. v. Smith, 255 U. S. 44, 65 L. Ed. 489, which was relied upon by the learned trial judge in his written opinion overruling the demurrer of plaintiff in error. This case involved a tax of $2 a barrel and $2 a ton respectively, upon persons manufacturing fish oil, fertilizer, and fish meal in whole or in part from herring. The court held very briefly that this was not a property tax, following the opinion in *Alaska Pacific Fisheries v. Alaska,* supra. This case again involved an output tax, or a tax on manufactured articles, which we have already shown to be very different from that considered in this appeal.

Each of the foregoing cases is further to be distinguished in the following respects:

1. A license fee was not first exacted, the issuance of a license provided for and then an additional so-called license tax exacted.

2. The legislative acts involved did not themselves characterize the taxes as being levied specifically on the property.

IX.

BEING A TAX ON PROPERTY, IT IS VOID UNDER SECTION 9 OF THE ORGANIC ACT.

Having shown that the tax in question is in fact one on property it should need no argument to show that it is void under the provisions of Section 9 of

the Organic Act, since it is neither assessed according to value nor uniformly.

Livingston v. Albany, supra.
Smith v. County Commissioners, supra;
P. C. & S. L. Ry. Co. v. State, supra.

X.

THE ACT IS VOID SINCE IT EMBRACES MORE THAN ONE SUBJECT AND SINCE THE SUBJECT IS NOT EXPRESSED IN THE TITLE.

If the contention of the plaintiff in error above made that the provisions of Section 3 impose a property tax is correct, the act is necessarily void since Section 1 imposes a license tax which alone is set out in its title.

> "No law shall embrace more than one subject, which shall be expressed in its title."

(Section 8 of the Organic Act, 37 Stat. L. 514, 1 Fed. Stats. Ann. 255.)

CONCLUSION.

In the Pacific Fisheries case, this court decided that despite the provisions of Section 9 of the Organic act requiring that all taxes be levied uniformly according to value, the Territory has power to impose license taxes for revenue. If this power is not to be abused, if property throughout Alaska is

not to be burdened with taxes irrespective of its value, taxes purporting to be levied on privileges must be carefully scrutinized to determine their actual character and effect. Otherwise, the limitations and safeguards set up in Section 9 of the Organic act will be nullified. Indeed, the attorney-general will concede that no taxes are levied and collected in Alaska in accordance with the provisions of Section 9 of the Organic act. All revenue is supplied by excise taxes. A careful definition of license taxes as distinguished from property taxes, must, therefore, be found and effectively applied.

As we have endeavored to show, this distinction rests upon the determination of whether the tax is in fact placed upon property or upon the privilege. This in turn must depend upon the language of the act itself and upon its necessary effect as well.

We have shown on behalf of plaintiff in error that the act itself in unmistakable terms places the tax "on the pelts", and not on the privilege of fur-trading. We have shown that the necessary effect of the act is to tax the pelts and not the privilege—that not only has the tax no relation to the privilege of fur-trading, but that it is levied on the "pelts" handled irrespective of whose hands deal with them. The trapper's "business" may escape taxation entirely. These considerations inevitably lead to the conclusion that the tax is on the property, and not on the business as such.

It, therefore, is submitted that to secure to plaintiff in error the protection vouchsafed it in Section 9 of the Organic Act the tax should be held a property tax, and the judgment should be reversed.

Dated, San Francisco,
February 10, 1923.

Respectfully submitted,

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